INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes and Constitutional Provisions Involved	2
Statement	2
Reasons for Granting a Writ of Certiorari	
A state may not constitutionally apply its civil rights law enacted under a joint federal-state scheme in a manner which denies constitutional remedies to an acknowledged victim of racially discriminatory employment practices	5
Conclusion	11
Appendix A—Order, Decision of Hearing Tribunal	1a
Appendix B—Memorandum and Order of Circuit Court	4a
Appendix C—Order of Court of Appeals	7a
Appendix D—Excerpts from Petitioner's Brief Before the Maryland Court Raising Federal Questions	21a
Appendix E—Excerpts from the Maryland Fair Employment Practices Act, Art. 49B, Md. Code Ann. (1957, 1974 Supp.)	22a
Appendix F—Excerpts from Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) (1970) as amended by the Equal Opportunity Act of 1972, 86 Stat. 103 (1972)	23a
Appendix G—United States Constitutional Provisions	25a
Appendix H—Complaint of Discrimination in Employment	26a

CITATIONS

Page

CASES:

Betts v. Easley, 161 Kan. 459 (1946) 7
Bibb v. Alton, 209 Ill. 461, 70 N.E. 640 (1904) 8
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 7
Crosslin v. Mountain States Tel. & Tel. Co., 400 U.S. 1004 (1971) 10
Evans v. Newton, 382 U.S. 296 (1966) 7
Gilliam v. City of Omaha, 331 F. Supp. 4 (D. Neb. 1971), *rev'd on other grounds*, 459 F.2d 63 (8th Cir. 1972) 6, 10
Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 265 A.2d 404 (1970) 8
Harkless v. Sweeney Independent School Dest., 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971) 8
Jenkins v. United Gas Corp., 400 F.2d 28, 34 (5th Cir. 1968) 7
Louisiana v. United States, 380 U.S. 145, 154 (1965) .. 7
Love v. Pullman, 404 U.S. 522 (1972) 10
McCabe v. Atchison T.E.S.F.R. Co., 235 U.S. 151 (1914) 7
Moody v. Albermarle Paper Co., 474 F.2d 134 (4th Cir. 1973), *cert. granted*, 43 U.S.L. Week 3344 (U.S. Dec. 17, 1974) (No. 74-389) 8
Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) 8
Potts v. Flax, 313 F.2d 284, 289 (5th Cir. 1953) 7
Randall v. Cowlitz Amusements, Inc., 1974 Wash. 82, 76 D.2d 1017 (1938) 8
Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971) 8
Shelley v. Kraemer, 334 U.S. 1 (1948) 7
Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966) 8
Solomon v. Pennsylvania Railroad Co., 96 F. Supp. 709 (S.D. N.Y. 1951) 7
State of Minnesota v. Bergeron, 290 Minn. 351, 187 N.W. 2d 680 (1971) 6, 7, 10
Sullivan v. Little Hunting Park, 396 U.S. 229 (1968) 6, 7, 9

Page

Testa v. Katt, 330 U.S. 386 (1947) 9
Williams v. Joyce, 4 Ore. App. 482, 479 P.2d 513 (1971) 8
Young v. International Tel. & Tel. Co., 438 F.2d 757 (3rd Cir. 1971) 8

CONSTITUTIONAL PROVISIONS:

United States Constitution, Article VI, Section 2 ... 2, 9

United States Constitution, Fourteenth Amendment 2, 6

STATUTES:

Civil Rights Act of 1866, 42 U.S.C. § 1982 9

Equal Opportunity Act of 1972, 86 Stat. 103 (1972) 2, 10

Maryland Civil Rights Law, Art. 49B, Md. Ann. Code § 1 *et seq* 2, 5

Title VII of the Civil Rights Act of 1964, 42 U.S. 2000e (1970) 2, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

PAUL D. GUTWEIN and State of Maryland Commission on Human Relations, *Petitioners*

v.

EASTON PUBLISHING CO., *Respondent*

To the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The decision of the Petitioner Commission was not reported and is reproduced in App. A, *infra*. The opinion of the Circuit Court for Talbot County, Maryland was not reported and is reproduced in App. B, *infra*. The decision of the Court of Appeals of Maryland (App. C, *infra*) is reported at—Md.—, 325, A.2d 740, 8 EPD ¶ 9728 (1974).

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on October 8, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether a state may constitutionally apply its civil rights law enacted under a joint federal-state scheme in a manner which denies constitutional remedies to an acknowledged victim of racially discriminatory employment practices?

STATUTORY AND CONSTITUTIONAL PROVISIONS

The statutory provisions involved are the Maryland Fair Employment Practices Act, Art. 49B, Md. Code Ann. §§ 17 *et seq.* (1957, 1974 Supp.) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1970) as amended by the Equal Opportunity Act of 1972, 86 Stat. 103 (1972). They are set forth in App. E and F, *infra*.

The constitutional provisions involved are the Supremacy Clause, Article VI, Cl. 2, and the Fourteenth Amendment, Sec. 1, to the United States Constitution. They are set forth in App. G, *infra*.

STATEMENT

The Easton Publishing Company (Easton) operates a weekly newspaper, the *Easton Star-Democrat*, which is located on the eastern shore of Maryland in the city of Easton in Talbot County. In the summer of 1969, Easton employed as a reporter-editor Paul D. Gutwein, a White male then single and 28 years old. At the time Gutwein was hired to work at the newspaper, he was engaged to be married and had related this

fact to Easton prior to his employment. The fact that Gutwein's fiancee was a Black woman was not known by Easton at the time Gutwein was hired.

On Sunday, August 10, 1969, one week after Gutwein started work at the newspaper, he became involved in a dispute with his landlord concerning his Black fiancee. Gutwein immediately related the incident to his employer and he was assured his fiancee's race would not be a factor in his employment. However, the next day Gutwein was told by Easton that he would be discharged because his fiancee's race would interfere with his effectiveness as a reporter on Maryland's eastern shore. Gutwein remained at the newspaper until August 21, 1969. Afterwards he was unemployed for a period of eight weeks; however, he received two weeks severance pay. He also incurred fifty dollars in moving expenses connected with his discharge from Easton. Gutwein later secured employment in Washington, D. C. and married his fiancee.

Meanwhile Gutwein filed a complaint on August 20, 1969 with the State of Maryland Commission on Human Relations (Commission) charging Easton with racial discrimination in connection with his discharge. (App. H, *infra*). The case proceeded through the statutory administrative process: an investigation was conducted, probable cause was found to credit Gutwein charges, conciliation failed and an evidentiary public hearing was conducted in Talbot County on December 11, 1972.

After the hearing the Commission issued its decision on March 8, 1973. The Commission found that Gutwein was discharged because of his fiancee's race and therefore he was the victim of a racially discriminatory employment practice. Easton was ordered to pay

Gutwein back pay in the amount of $557.16 and $50.00 in moving expenses. (App. A, *infra.*)

Subsequently, Easton appealed the Commission's decision to the Circuit Court for Talbot County, Maryland. Easton challenged both Gutwein's rights under the state civil rights law and the Commission's remedy of awarding back pay and moving expenses. In response, the petitioners raised constitutional issues regarding Maryland's duty to adequately remedy racially discriminatory employment practices. The circuit court agreed with the Commission's finding that Gutwein's discharge occurred because of his employer's discovery that his fiancee was Black. Nevertheless, the circuit court reversed the Commission's decision holding that Gutwein possessed no civil rights which were violated. (App. B, *infra*).

Thereafter Gutwein and the Commission appealed to the Court of Appeals of Maryland. Petitioners again raised constitutional issues before the Court of Appeals. (App. D, *infra*). On October 8, 1974, the Court of Appeal reversed the judgment of the circuit court holding that state law did indeed give Gutwein a civil right by which to complain against a racially discriminatory employment practice and that Easton's conduct offended Gutwein's civil rights under state law. Nevertheless, the Court of Appeals interpreted the remedial provisions of the state civil rights law as not contemplating relief to deal with the effects of discrimination. (App. C. *infra.*) Consequently, the Commission order of relief for Gutwein was vacated and Gutwein was left in possession of a civil right but without a remedy for the violation of that right.

A motion for reargument was denied by the Court of Appeals of Maryland on November 6, 1974.

REASONS FOR GRANTING THE WRIT

The Constitution Requires a State To Provide Remedies to Victims of Racially Discriminatory Employment Practices Which Are Adequate and Eliminate the Effects of Discrimination

The Maryland Fair Employment Practices (FEP) law, Art. 49B, Md. Code Ann. §§ 17 *et seq.* (1974 Supp.) was enacted in 1965 under the umbrella of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1970), so that Maryland could participate in the joint federal-state civil rights enforcement contemplated by Congress. Several factors ilustrate this principle.

The Maryland FEP law created new civil rights, the opportunity to secure and maintain employment free from racially discriminatory treatment. The provisions of the Maryland FEP law creating these new substantive rights are identical to those contained in Title VII (*compare,* App. E-Sec. 19 with App. F-Sec. 703), a factor acknowledged by the Court of Appeals of Maryland (App. C, *infra,* p. 11a). In effect, when Maryland adopted its FEP law, it adopted federal law as its own. Maryland has continued to follow federal law by also adopting the recent changes to Title VII, *see,* Chap. 493, Laws of Md. 1973.

Title VII itself provides a scheme for joint federal-state participation in civil rights law enforcement, 42 U.S.C. 2000e-5 (1970). Under Title VII states may be certified as deferral agencies to received complaints filed under the federal scheme. The subsequent work product of the state is required to be given substantial weight. The Maryland Commission has operated as a deferral agency since 1966. Of course state participation under Title VII's federal-state scheme presupposes that the state law accords rights and remedies to victims of discrimination which are in conformity with federal law.

Under this procedure several thousand persons have been encouraged to seek relief directly from the Maryland Commission and by passing the procedure under federal law believing that federal and state civil rights and remedies were identical. The decision of the Court of Appeals of Maryland leaves these persons without any opportunity to vindicate possible abuse of their civil rights.

The decision of the Court of Appeal of Maryland recognizes the existence of state civil rights identical to federal law. The decision also acknowledged that the civil rights of Petitioner Gutwein were violated. Inexplicably, however, Petitioner Gutwein was denied a remedy, the Maryland court holding that the *effects* of a racially discriminatory employment practice could not be remedied under Maryland law. The state court specifically ruled that back pay could not be awarded a victim of racial discrimination. This decision, for reasons stated below, unconstitutionally sanctions a racially discriminatory employment practice.

1. Abdication of a constitutional duty

The Maryland court's decision has avoided a duty under the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution to eliminate discrimination when it is discovered. It is firmly established that state civil rights agencies and state courts are under a constitutional obligation to enforce the same rights and provide the same remedies in the civil rights field as are available in federal courts, *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1968); *State of Minnesota* v. *Bergeron*, 290 Minn. 351, 187 N.W. 2d 680 (1971); *Gilliam* v. *City of Omaha*, 331 F. Supp. 4 (D. Neb. 1971), rev'd on other grounds, 459 F. 2d 63

(8th Cir. 1972); see also, *Betts* v. *Easley*, 161 Kan. 459, 169 P. 2d 831 (1946). Both federal and state civil rights laws are based upon constitutional principles and merely provide differing mechanisms to vindicate constitutionally protected rights. In effect, a person invoking a state civil rights law substantially equivalent to federal law is also invoking these constitutionally protected rights. Enforcement of these state laws includes a duty to provide constitutional remedies. *State of Minnesota* v. *Bergeron, supra; see Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

With respect to the instant case, the Maryland court's failure to acknowledge a remedy for the discriminatory practices of the Respondent amounts to unconstitutional state action. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). This Court stated in Burton that "no state may effectively abdicate its responsibilities by either ignoring them by merely failing to discharge them . . ." Id. at 725. By not acting to provide a remedy against the Respondent's practices, Maryland became a joint participant in the illegal discrimination by permitting it to continue without sanction. *Evans* v. *Newton*, 382 U.S. 296 (1966); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *State of Minnesota* v. *Bergeron, supra; Jenkins* v. *United Gas Corp.*, 400 F. 2d 28, 34 (5th Cir. 1968); *see also, Potts* v. *Flax*, 313 F. 2d 284, 289 (5th Cir. 1953).

The remedy of damages has long been recognized as a constitutional requisite to vindicate those whose civil rights have been violated. *Sullivan* v. *Little Hunting Park, supra; McCabe* v. *Atchison T & S.F.R. Co.*, 235 U.S. 151 (1914); *see also, Solomon* v. *Pennsylvania Railroad Co.*, 96 F. Supp. 709 S.D.N.Y. 1951). Such damages have also been applied under state laws.

Williams v. *Joyce*, 4 Ore. App. 482, 479 P. 2d 513 (1971); *Gray* v. *Serruto Builders, Inc.*, 110 N.J. Super. 297, 265 A. 2d 404 (1970); *Randall* v. *Cowlitz Amusements, Inc.*, 194 Wash. 82, 76 P. 2d 1017 (1938); *Bibb* v. *Alton*, 209 Ill. 461, 70 N.E. 640 (1904).

Back pay as a remedy for employment discrimination is a specific application of these general principles. Indeed, back pay has been held a constitutional remedy as well as a remedy necessarily implied from statutes creating civil rights. *See, Young* v. *International Tel. & Tel. Co.*, 438 F. 2d 757 (3rd Cir. 1971); *Sanders* v. *Dobbs Houses, Inc.*, 431 F. 2d 1097 (5th Cir. 1970), *cert. denied* 401 U.S. 948 (1971); *Smith* v. *Hampton Training School for Nurses*, 360 F. 2d 577 (4th Cir. 1966); *Harkless* v. *Sweeny Independent School Dist.*, 427 F. 2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971). Under Title VII, back pay has become a mandatory remedy to effectuate the elimination of discriminatory employment practice. *Moody* v. *Albermarle Paper Co.*, 474 F. 2d 134 (4th Cir. 1973), *cert. granted*, 43 U.S.L. Week 3344 (U.S. Dec. 17, 1974) (No. 74-389); *Pettway* v. *American Cast Iron Pipe Company*, 494 F. 2d 211 (5th Cir. 1974).

After finding discriminatory employment practice which operated against Petitioner Gutwein, the Commission proceeded to fashion relief to eliminate the effects of such practice. (App. A, *infra*, pp. 3a). This specific relief was necessary to vindicate Gutwein's rights since any future employment with Easton would be unlikely.

Had Gutwein not been encouraged by Maryland law to seek vindication of his civil rights through state law, he quite likely would have obtained adequate relief directly under federal law. The Maryland court's in-

terpretation of its state civil rights law as providing only rights identical to federal law but not remedies, clearly denies to Gutwein and all those persons similarly situated equal protection under the law. The Maryland court's action denies to Gutwein necessary constitutional relief to which he and the public are entitled. Failure to grant this constitutional relief renders the Maryland FEP law a sham and amounts to unconstitutional sanction of discriminatory practices.

2. Supreme law of the land

State courts cannot directly refuse to enforce a federal law and should not be allowed to do so indirectly. In *Testa* v. *Katt*, 330 U.S. 386 (1974), this Court ruled that a state court's refusal to apply federal standards was in violation of Article VI, Section 2, of the U.S. Constitution which binds state judges to the "supreme law of the land."

This Court has already had occasion to review the attempt of a state court to evade the enforcement of a federal civil rights law. *Sullivan* v. *Little Hunting Park, supra.* The Virginia Supreme Court of Appeals used a discretionary state procedural rule to block an appeal in a housing discrimination case based on § 1982, Civil Rights Act of 1866. In applying the supremacy doctrine this Court overruled the state judges' decision that no jurisdiction existed and further ruled that the measure of damages must be in accord with federal law.

Gutwein, like Sullivan, invoked a civil rights statute. However, Gutwein relied on the state fair employment law as being equivalent to the federal law protecting him from discriminatory employment practices. The Maryland Court of Appeals, as had the Virginia

court in *Sullivan*, exercised its discretion and found the state law lacking sufficient specificity to allow money awards by the enforcement agency. This decision, in effect, means that the state legislature intended to lay a trap for unwary Maryland citizens who would forego pursuing their federal rights because they were encouraged to utilize a state agency. While the Maryland law is not a carbon copy of the federal law (being much less detailed in all sections) the background of how and when it was passed indicates that the state legislature made the choice to participate in a joint federal-state enforcement scheme. As a result, the Maryland court should not be allowed to emasculate the substantive rights protected by denying any meaningful remedy. *State of Minnesota* v. *Bergeron, supra; Gilliam* v. *City of Omaha, supra.*

When Title VII was enacted, a cornerstone of the Act included a provision for local enforcement by state civil rights agencies, Congress believing this approach to be the most effective means of eliminating discrimination. This procedure is effectuated by means of statutory deferral provisions which were reviewed by the U.S. Supreme Court on two occasions. *Love* v. *Pullman*, 404 U.S. 522 (1972); *Crosslin* v. *Mountain States Tel. & Tel. Co.*, 400 U.S. 1004 (1971). Under *Crosslin*, a state interest under Title VII cannot be ignored. That Congress intended that state agencies are to be an integral part of Title VII enforcement is further buttressed by the *Equal Opportunity Act of 1972*, which requires that the result of enforcement under state laws is to be given substantial weight by federal government. See. Section 706(b) of Title VII, as amended March 24, 1972, P.L. 92-226, Sec. 4.

While the state agencies involved in the *Love* and *Crosslin* cases were expressly limited to conciliation, the Maryland administrative agency was clearly designed as an enforcement agency. However, cease and desist powers without the accompanying affirmative powers, including compensatory relief, are meaningless, and water down effective enforcement of federal law. The Maryland court has abused its discretion in interpreting the state statute as not providing enforcement powers thus inferring that the legislature meant to create a right but no remedy. This abuse of discretion under the facts of the instant case constitutes a disregard of the supremacy clause.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the Court of Appeals of Maryland should be granted.

Respectfully submitted,

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January 6, 1975

APPENDIX A

BEFORE THE HEARING TRIBUNAL OF THE
STATE OF MARYLAND COMMISSION ON HUMAN RELATIONS

FEP 69-681

PAUL D. GUTWEIN

v.

EASTON PUBLISHING COMPANY

Order

Pursuant to Rules 11 and 13 of the Rules of Procedures of the Maryland Commission on Human Relations, it is hereby ordered this 8th day of March, 1973 that the attached Opinion of the Hearing Tribunal in the above captioned case is hereby adopted and issued as the Order of the Commission the provisions of which are to take effect immediately upon receipt.

Relief to Mr. Gutwein is to be paid no later than March 23, 1973.

/s/ JACOB J. EDELMAN
Jacob J. Edelman, *Chairman*

Decision of the Hearing Tribunal

The above captioned matter was brought for hearing before a duly constituted Hearing Tribunal of the Maryland Human Relations Commission on 12/11/72 at Easton, Maryland.

The original complaint in the matter was filed 8/20/69 alleging racial discrimination in the employment termination effective 8/21/69. The evidence is uncontested that the Complainant was notified 8/11/69 of his discharge. Respondent paid two (2) weeks severance pay unto the Complainant although under no legal obligation thereon. Respondent has raised objections to the filing of the complaint prior to final date of unemployment. The crucial

issue however, is the termination which was effectuated 8/11/69 and the cogent reasons motivating same. The Tribunal finds no irregularities in the proceedural sequence of events henceforth set forth.

An amended complaint was filed by the Complainant 11/3/72 adding to the original charges:

A. Maintenance of sex discrimination policies by virtue of my termination.

B. Maintenance of racially discriminatory hiring and recruiting practices.

At the hearing on 12/11/72 after proper motion by the Respondents Counsel the Tribunal dismissed the Count B relating to the maintenance of racially discriminating hiring and recruiting practices. The Tribunal deferred ruling on Count A, to wit "the maintenance of sex discrimination policies by virtue of my termination". Respondent has raised numerous objections to the amended complaint including but not limited to the timing, due process, etc. The Tribunal seriously questions the need and necessity of amending a complaint some three years subsequent to termination of employment bringing matters before the Tribunal not certified for public hearing pursuant to Article 49 B, Section 16 and the applicable provisions of due process relating to an administrative hearing. However in this case the evidence presented being insufficient to sustain the charge enumerated in Count "A" of the amended complaint be and is hereby dismissed. Any further discussion of the issues in view of this ruling renders the questions raised as a moot problem.

The Respondent has raised objections to the jurisdiction of the Maryland Human Relations Commission as being inapplicable to this case; however the weight of the authorities, EEOC decision amply demonstrate that racial discrimination however manifested cannot and will not be tolerated.

Numerous witnesses, exhibits, and a tape interview were heard and examined by the Tribunal. From the evidence the Tribunal determines as a finding of fact inter alia that the complainant was discharged for his association and relationship with his black girl friend. Racial discrimination being a cause for the termination, said act being prohibited by the provisions of Article 49 B, Section 19 A, the complainant be and is hereby entitled to an award of damages.

Numerous items of damages were presented to the Tribunal, including alleged losses on a purchase/sale of a truck, rents, gas, oil, electric and lost wages. No evidence of depreciation, wear and tear, marketability effect of psychedelic paint, etc. were presented and to award damages for the truck transaction would be indulging in speculation at the expense of the Respondents. Inasfar as rent, gas and electricity is concerned, the evidence indicates the complainant received the benefit of these experditures and are therefore accordingly disallowed. Consequential damages be and are restricted to items that are directly related to the wrongful discharge.

The Complainant is awarded damages for six (6) weeks loss of pay, giving credit to the Respondent for the two (2) weeks severance pay, in the amount of $557.16, plus $50.00 for moving expenses for a total of $607.16.

Respectfully submitted,

/s/ Eloise C. Hall
/s/ Ernest H. Lyte
/s/ Paul W. Barnett,
Chairman of Hearing Tribunal

APPENDIX B

IN THE CIRCUIT COURT FOR TALBOT COUNTY

No. 4096 Law

PAUL D. GUTWEIN, ET AL.

v.

EASTON PUBLISHING COMPANY

Opinion and Order

The Easton Publishing Company appeals from a finding of the State Human Relations Commission that the employment of Paul D. Gutwein as reporter-assistant editor of its weekly newspaper was terminated upon racial grounds, in violation of Article 49B, and awarding Gutwein damages therefor.

The factual situation is extremely simple and I find, as did the Commission, that there was substantial, competent and material evidence (Art. 41, Sec. 255 g) that a major reason for Gutwein's termination was the employer's discovery that (he being white) his fiancee was black. Since Sec. 19(a) of Art. 49B only proscribes employment discrimination on account of "such individual's race", the short, simple, and obvious answer to Gutwein's complaint of violation is that the termination involved not his own race, but rather his fiancee's. It was conceded by the Appellees in argument that, in a reverse situation, a black employee who had a white fiancee would similarly have been terminated, so that the trigger of termination would clearly not be "such individual's race". Indeed, had his race been the factor, Gutwein would probably not have been employed in the first place.

The Appellees, however, submit that a proper interpretation of the law does not restrict it to direct racial implications, and that it reaches as well indirect and consequential racial involvement. The Commission found the proper construction to be "that racial discrimination however

manifested cannot and will not be tolerated". Zeal and a sense of mission, however, cannot be substituted for ordained intent and purpose, and the law itself does not seem to warrant such an interpretation.

The very enactment of the law indicates a legislative recognition that we do not as yet have a millennial or absolute equality. An analysis of its provisions reveals built-in limitations of purpose, i.e., it disavows employment quotas, it permits purposeful and warranted discriminations, and allows disregard of classifications in instances of intrinsic occupational qualifications. It has since been amended to exempt specifically requirements in dress and grooming. It demands and provides only that an employee's class shall not ipso facto be a factor in his employment (with the defined exceptions). It nowhere implies any advantage nor does it grant any special privilege.

The Appellant points out that a reporter-assistant editor holds a sensitive position as contrasted to a typesetter or proofreader, that a respect for the public mores and customs is necessary for his rapport and acceptability in the community, and that without these his effectiveness is limited or destroyed. The Appelles, in response, submit that even such peripheral and coincidental considerations are proscribed by the law, and if there is any taint of discrimination it permeates the employment ab initio. With this I cannot agree. Had this complainant been a gay libber legally married to another man, would he have been able to claim sexual discrimination? Were he an active partisan and public protagonist in the present Middle East confrontation, would his termination be a religious discrimination? The questions almost answer themselves—it is not his sex, race or religion, but what he is doing, that is the crux of the matter.

With this perspective the issue here comes clearly into focus, and the many authorities cited by the Appellees lose relevance, because we are not primarily concerned with

racial discrimination at all. Whatever it be called, the factor involved is one of those indescribable, imprecise, or even amorphous, considerations which are a part of every employment to a greater or less degree. How much more relevant it might be than technical skill in the subject position, as contrasted to a typesetter or proofreader, is not significant. What is important is that this factor was, and could have been at the time of employment, a legitimate and controlling reason for preferment, entirely apart from any question of "such individual's race"—or religion, or ancestry, etc. The purpose of the law (Sec. 17) is "to assure all persons equal opportunity * * * regardless of race," etc. It clearly means that, while device or contrivance may not be used to defeat it, neither may its guise be used for defiance or reform of established social and economic systems. It is a shield of protection and not a sword of conquest. I find, therefore, that the present termination was not discriminatory and that the employer has not been guilty of an unlawful employment practice.

In addition to the defense of lack of statutory jurisdiction of the subject-matter here, the Appellant offered an extensive defense on the merits based upon professional incompetency. The Commission made no specific findings thereon, but in view of the above-stated conclusion, that question is not reached and remand is unnecessary. The Appellant also urged as a plea in bar that the complaint was improperly filed the day before duty ceased and severance pay commenced. It is undisputed, however, that definite notice of termination, on an unspecified future date, had been given ten days previously. This contention is unsound, since the cause for complaint arose at the time of notice and, in many cases, would be the most efficacious time for action.

A corollary of the basic conclusion herein is that, through failure of proof of any redressible injury, compensatory damages could not have accrued. However, in the vein of the holding of the Court of Appeals in Ferguson v. United

Parcel Service, 270 Md. 202, the allowance of such in this case would nonetheless be improper. There was no evidence of how hard the employee sought employment, or where, or even what kind (he was a novice in news work), and his bare statement that he "was looking for work for approximately eight weeks" is not such substantial evidence as will support the decision under review, and this is also true of the award for moving expenses.

It Is Thereupon, this 9th day of January, 1974, by the Circuit Court for Talbot County, Ordered, that the decision of the Commission herein is reversed and the complaint dismissed.

/s/ James A. Wise
Judge

APPENDIX C

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1974

No. 19

Paul D. Gutwein et al

v.

Easton Publishing Company

Before, Murphy, C. J., Singley, Digges, Levine, Eldridge, O'Donnell, JJ.

Opinion by Murphy, C. J.

Filed: October 8, 1974

This appeal from an order of the Circuit Court for Talbot County reversing an order of the Maryland Commission on Human Relations raises important questions regarding the reach of the Commission's jurisdiction and the scope of its enforcement powers.

Maryland Code (1972 Repl. Vol.) Art. 49B entitled "Human Relations Commission" makes provision in § 1 for a twelve-member Commission appointed by the Governor with the advice and consent of the Senate. The Commission is authorized by § 3 "to make such surveys and studies concerning human relations, conditions and problems as it may determine, and to promote in every way possible the betterment of human relations"; to recommend legislation; and to hold an investigatory hearing "[w]henever any problem of racial discrimination arises . . . [and] to resolve the problem promptly by the gathering of all the facts from all the interested parties and making such recommendations as may be necessary." Discrimination in places of public accommodation is made unlawful by § 11; discrimination in employment is prohibited by § 19; and discrimination in housing is prohibited by § 22. Section 12 provides for the filing and issuance of complaints by and with the Commission, alleging discrimination prohibited by the provisions of Article 49B. Section 13 requires that the Commission investigate such complaints and if probable cause is found to believe that a discriminatory act has been committed, the Commission is enjoined "to eliminate the discrimination by conference, conciliation and persuasion." Section 14 provides that, failing voluntary agreement to eliminate the discrimination, the Commission shall hold a public hearing and require the respondent to answer the charges set forth in the complaint. Section 14(c), authorizing the Commission to issue "Cease and Desist" orders, provides:

> "If upon all the evidence, the Commission finds that the respondent has engaged in any discriminatory act within the scope of any of these subtitles, it shall so state its findings. The Commission thereupon shall issue and cause to be served upon the respondent an order requiring the respondent to cease and desist from the discriminatory acts and to take such affirmative action as will effectuate the purposes of the particular subtitle."

Section 15 authorizes the Commission to institute litigation in the equity courts to compel compliance with its orders.

In pursuance of the provisions of Article 49B, the apellant Gutwein, a white male, filed a complaint with the Commission on August 20, 1969, alleging that his employer, appellee Easton Publishing Co. (Easton), had unlawfully terminated his employment as a news reporter when it learned that his fiancee was black.[1] Following an investigation and evidentiary hearing, the Commission concluded, by order dated March 8, 1973, that Easton had unlawfully discharged Gutwein from his employment in violation of the racial discrimination provisions of § 19(a) of Article 49B, which provide:

> "It shall be an unlawful employment practice for an employer:
>
> "(a) To fail or refuse to hire or *to discharge any individual*, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race*, color, creed, sex, age or national origin." (Emphasis added.)

The Commission found from the evidence adduced before its hearing tribunal that Gutwein "was discharged [from his employment] for his association and relationship with his black girl friend." The Commission ordered that Easton pay Gutwein the amount of $207.16, representing six weeks' loss of pay, and $50 for moving expenses.

On appeal by Easton, pursuant to the provisions of the Administrative Procedure Act, Article 41, §§ 244-256A, the circuit court reversed the Commission's order, holding that because § 19(a) only proscribed employment discrimination on account of "such individual's race," and since

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[1] Easton employed Gutwein as a reporter for its weekly newspaper, the *Easton Star Democrat*, on August 4, 1969. His employment was terminated on August 21, 1969.

Gutwein's discharge from Easton's employ "involved not his own race, but rather his fiancee's," the provisions of the section were not applicable to Gutwein's termination. The court further held that while there was substantial evidence "that a major reason for Gutwein's termination was the employer's discovery that (he being white) his fiancee was black," the termination "was not discriminatory and . . . the employer has not been guilty of an unlawful employment practice." The court concluded that since Gutwein failed to prove any redressable injury, "compensatory damages could not have accrued."

The Commission and Gutwein each appealed, raising these questions:

1. Was the finding of an administrative agency that a white male was terminated from his employment because of his interracial association with a black female based upon substantial evidence?
2. Can a white male lawfully be terminated from his employment because of his interracial association with a black female?
3. Does the Human Relations Commission possess authority to award compensatory damages upon a finding of employment discrimination?

(1)

The evidence before the Commission concerning the reason for Gutwein's termination from Easton's employment was in sharp conflict. There was substantial evidence to demonstrate that Gutwein's discharge was triggered by improper job performance, poor work ability, a slovenly appearance, a bad attitude, and deficiencies in his personal conduct unassociated with the race of his fiancee. There was other evidence, equally substantial if believed, tending to show that Gutwein's employment was ended when Easton learned of his relationship with his black fiancee in the town of Easton. The Commission found as a fact from the evidence adduced at the hearing

that it was the latter reason which precipitated Easton's action in terminating Gutwein's employment. Being supported by substantial evidence, the Commission's finding should have been accepted by the circuit court. *See Grosman* v. *Real Estate Comm'n*, 267 Md. 259, 297 A.2d 257 (1972); *Bernstein* v. *Real Estate Comm.*, 221 Md. 221, 156 A.2d 657 (1959); Article 41, § 255.

(2)

As heretofore indicated, § 19(a) makes it an unlawful employment practice for an employer "to discharge any individual . . . because of such individual's race . . . ." Appellants maintain that this provision reaches racial discrimination however manifested and protects all persons from discriminatory practices. Easton maintains that the lower court was correct in concluding that it was the race of Gutwein's fiancee that triggered his termination, and not his own race, and that consequently § 19(a) has no applicability to the facts of this case. We think instances of discrimination in employment involving, as here, the termination of a white complainant's employment because of his association with his black fiancee are plainly within the contemplation and coverage of § 19(a). The race of Gutwein's fiancee was manifestly not the only reason for his dismissal; rather his employment was terminated because he was white and was intimately associated with a black woman, a relationship so offensive to Easton as to cause it to discharge Gutwein from his position.[2]

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[2] Language identical to that in Section 19(a) is contained in Title VII of the Federal Civil Rights Act, 42 U.S.C.A. 2000e-2(a). The United States Equal Employment Opportunity Commission has held that a white employee's interracial associations are protected by the statute. *See* EEOC Decision No. 71-1902, decided April 28, 1971, 3 FEP 1244; EEOC Decision No. 71-969, decided December 24, 1970. *See also* Langford v. City of Texarkana, 478 F.2d 262 (8th Cir. 1973).

(3)

The enforcement powers vested in the Commission, contained in § 14(c), authorize it to issue "an order requiring the respondent to cease and desist from the discriminatory acts and to take such affirmative action as will effectuate the purposes of the particular subtitle." The appellants claim that the purpose of this provision is "to make whole victims of discrimination as well as insure against future unlawful conduct." They contend that the Commission's authority to order "affirmative action" is identical to that contained in virtually all civil rights laws, state and federal, and that such laws have been interpreted "expansively" to permit the payment of compensatory damages to victims of discrimination.

We note at the outset that the "affirmative action" provision in § 14(c) is tied to "the purposes of the particular subtitle." Section 17 of Article 49B sets forth the purpose of the subtitle on "Discrimination in Employment" as follows:

> "It is hereby declared to be the policy of the State of Maryland, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and for the promotion of the State's trade, commerce and manufacturers *to assure all persons equal opportunity in receiving employment* and in all labor management-union relations regardless of race, color, religion ancestry or national origin, sex, or age, *and to that end to prohibit discrimination in employment* by any person, group, labor organization, organization or any employer or his agents." (Emphasis added.)

Neither § 17 or § 14(c) speaks in terms of remedying the "effects" of employment discrimination, or of preventing economic loss, redressing individual rights or compensating victims of discrimination. Section 17 is plainly couched in prohibitory and not compensatory terms.

Unlike § 14(c) of Article 49B, Title VII of the Federal Civil Rights Act has a separate enforcement provision (42 U.S.C.A 2000e-5(g)) relating to discriminatory employment practices and the remedies authorized therein are court-enforced. The federal law provides:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and *order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement, or hiring of employees, with or without back pay* (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate . . . .*" (Emphasis added.)

While the federal statute specifically provides for back pay awards, federal courts are divided over the question whether the statute authorizes payment of other compensatory damages. Those courts which hold that Title VII authorizes compensatory damages do so on the basis that the statute was designed "to restore those wronged to their rightful economic status absent the effects of the unlawful discrimination," *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90, 96 (3d Cir. 1973) or "to put the aggrieved party in the same position he would have been but for the defendant's illegal interference with the employer-employee relationship," *Tidwell* v. *American Oil Co.*, 332 F.Supp. 424, 437 (D. Utah 1971). Those federal courts which hold that Title VII does not authorize compensatory damages have concluded that the statute grants only equitable relief, *Loo* v. *Gerage*, 374 F.Supp. 1338, 1341-42 (D. Hawaii 1974); or that an examination of the legislative history of the statute and of its legislative model —the National Labor Relations Act, 29 U.S.C.A. § 160(c), and the damage provisions of the Fair Housing Act of 1968, 42 U.S.C.A. § 3612, demonstrate that Congress did not

intend a damage remedy, *Van Hoomissen* v. *Xerox Corp.*, 368 F.Supp. 829, 835-38 (N.D. Calif. 1973); or that "the omission of any such provision in a statute which sets forth the types of relief which may be afforded to an aggrieved person must be deemed to have been intentional," *Howard* v. *Lockheed-Georgia Co.*, 372 F.Supp. 854, 856 (N.D. Ga. 1974).[3]

State statutes specifically authorizing the administrative agency to make an award of compensatory damages for wrongful discrimination have been construed in some instances to sanction money damage awards for mental anguish and humiliation.[4] In *State Commission for Human Rights* v. *Speer*, 29 N.Y.2d 555, 324 N.Y.S.2d 297 (1971), a housing discrimination case, the Court of Appeals of New York held that the statute empowering the Commission to require respondents "to take such affirmative action, including (but not limited to) . . . awarding of compensatory damages to the person aggrieved by such [unlawful] practice, as, in the judgment of the division, will effectuate the purposes of this article," sanctioned damage awards for mental anguish. In Massachusetts, the Commission is authorized by statute in housing discrimination cases to "award the petitioner damages not to exceed one thousand dollars . . . ." This statute was held to authorize an award of money damages for humiliation in *Massachusetts Commission Against Discrimination* v. *Franzaroli*, 357 Mass. 112, 256 N.E.2d 311 (1970). Other states having statutes evidencing a clear legislative intent to eliminate the effects of discrimination or specifically sanctioning back pay awards have construed such statutes

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[3] One federal court has said Title VII authorizes punitive but not compensatory damages. Tooles v. Kellogg Co., 336 F. Supp. 14 (D. Neb. 1972).

[4] Seven states and the District of Columbia *specifically* authorize courts or administrative agencies to make money awards for damages suffered as a result of unlawful discrimination. *See* BNA, Fair Employment Practice Manual, § 451.

to authorize compensatory damages. In *A. P. Green Services Division of Bigelow-Liptak Corp.* v. *State Fair Employment Practices Commission*, Ill. App. 2d , 312 N.E.2d 314 (1974), language empowering the Commission to order the respondent "to take such affirmative or other actions with respect to the complainant as will eliminate the effect of the practice originally complained of," was held to sanction compensatory damages. In *Williams* v. *Joyce*, 4 Or. App. 482, 479 P.2d 513 (1970), the court, viewing similar statutory language, coupled with an extensive recitation of purposes relating to the rights, health and dignity of the individual complainant, held in a housing discrimination case that the Commission had power to award damages not only for out-of-pocket expenses but for mental anguish.[5]

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[5] ORS ch. 659 provides that the commissioner shall issue "an appropriate cease and desist order against any respondent found to have engaged in any unlawful practice charged." ORS 659.010 spells out what is meant by a cease and desist order:

> "(2) 'Cease and desist order' means an order * * * issued to eliminate the effects of any unlawful practice found, addressed to a respondent requiring him to:
>
> "(a) Perform an act * * * reasonably calculated to carry out the purposes of ORS 659.010 to 659.110, eliminate the effects of an unlawful practice found, and protect the rights of the complainant and other persons similarly situated * * *."

ORS 659.022 states the purposes of ORS 659.010 to ORS 659.110, some of which are to "insure human dignity" and "to protect [the victim's] health * * * from the consequences of intergroup hostility, tensions and practices of discrimination." It says that:

> "* * * To accomplish this purpose the Legislative Assembly intends by ORS 659.010 to 659.110 to provide:
>
> "* * *
>
> "(2) An adequate remedy for persons aggrieved by certain acts of discrimination because of race, religion, color, sex or national origin or unreasonable acts of discrimination in employment based upon age."

In *Jackson* v. *Concord Co.*, 54 N.J. 113, 253 A.2d 793 (1969), a housing discrimination case, the Supreme Court of New Jersey, considering a statute similar to the federal law,[6] concluded from the specific mention of a back pay award and a legislative intent to create an effective enforcement agency that money damage awards were permitted.[7] In 1973, this damage remedy was held to authorize a monetary award for pain and suffering. *Zahorian* v. *Russell Fitt Real Estate Agency*, 62 N.J. 399, 301 A.2d 754 (1973).

Other state courts viewing enforcement provisions practically identical to those contained in the New Jersey statute have concluded that their statutes do not empower a Commission to award money damages for unlawful discrimination. In the most recent, *Ohio Civil Rights Com-*

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[6] The enforcement provisions of most state civil rights laws or fair employment practice acts follow the federal model by delineating the meaning of "affirmative action" and specifically sanctioning back pay awards.

[7] The New Jersey statute provides:

> "If, upon all evidence at the hearing the director shall find that the respondent has engaged in any unlawful employment practice or unlawful discrimination as defined in this act, the director shall state his findings of fact and conclusions of law and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice or unlawful discrimination and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership, in any respondent labor organization, or extending full and equal accommodations, advantages, facilities, and privileges to all persons, as, in the judgment of the director, will effectuate the purpose of this act, and including a requirement for report of the manner of compliance. The director shall have the power to use reasonably certain bases, including but not limited to list, catalogue or market prices or values, or contract or advertised terms and conditions, in order to determine particulars or performance in giving appropriate remedy. * * *"

mission v. *Lysyj*, 38 Ohio St. 2d 217, 313 N.E.2d 3 (1974), a housing discrimination case, the Supreme Court of Ohio said:

> "The authority to take 'affirmative action' may well include extensive powers to effectuate the purpose of the Civil Rights Act, but, under existing statutory language, those powers are to be directed towards ending the unlawful discriminatory practice and securing compliance with the cease and desist order. If the General Assembly had intended to authorize the commission to grant compensatory or punitive damages, it would have been a simple matter to explicitly so provide, as was done elsewhere in the Act."

In *Zamantakis* v. *Commonwealth Human Relations Commission*, 10 Pa. Comm. 107, 117, 308 A.2d 612, 616 (1973), it was said:

> "As we view our role in this case, on this issue, we must determine whether *our* Legislature intended *our* Commission to award compensatory damages for 'humiliation and mental anguish.' We first note that in the Pennsylvania statute, there is no specific legislative language authorizing the Commission to award such damages. Next, we note that the statutorily provided proceeding is directed to be expeditious and informal, as are most administrative procedures. There are none of the formal trappings, evidentiary protections, and strict procedures of a court of law. In addition, the members of the Commission necessarily need not be trained or learned in the law. As so often happens in an administrative proceeding, the Commission and its employes are the investigators, the prosecutors, the judges and jury. On balance, this results in an unduly heavy force on the side of the proponents of *damages*. Traditionally, damages, in this Commonwealth, have been a matter for courts of law, under an adversary system of justice, and therefore unless the Legislature clearly authorizes the Commission to award damages, we cannot extend to it such authority by judicial fiat, nor can we broaden the scope of the Commission's authority into a full scale lawsuit." (Emphasis in original.)

And in *Iron Workers Local No. 67* v. *Hart*, 191 N.W.2d 758, 767 (Iowa 1971), the court said:

> "The right granted Commission to allow back pay for employees ordered hired, reinstated or upgraded is only incidental to affirmative action equitably decreed and cannot by analogy generate a power to enter judgment for other common law damages. If the legislature had intended to constitute Commission as an additional court for adjudicating damages it would have so stated."

These cases indicate that even when the legislature is fairly explicit about the meaning of "affirmative action," a monetary damage remedy is not to be lightly implied. Those cases that have implied the existence of such a damage remedy have involved statutory language plainly indicative of a legislative intent to authorize monetary awards. No court, however, without more statutory direction, has construed the bare words, "affirmative action as will effectuate the purposes" of the statute, as set forth in § 14(e), to authorize a monetary award.

In *Mendota Apartments* v. *D. C. Commission on Human Rights*, 315 A.2d 832, 836 (D.C. 1974), the District of Columbia Court of Appeals, viewing language identical to that contained in § 14(e) held:

> "If the Commissioners had intended to give the Commission the extraordinary and unusual power to award damages, surely they would have said so in express words, specifying the basis on which damages could be awarded and some limitation on the amount that could be allowed. In our opinion the authority to order a respondent to 'take such affirmative action as will effectuate the purposes of this Article' did not include the authority to award civil damages. . . ."[8]

See also Murphy v. *Industrial Commission*, 37 Wis.2d 704, 157 N.W. 2d 568 (1968), where the Supreme Court of Wis-

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[8] The District of Columbia statute now in force specifically authorizes the Commission to award compensatory damages.

consin held that the State Fair Employment Practices Act did not authorize a back pay award.[9]

We do not think that the General Assembly of Maryland, in enacting § 14(e), intended that the Commission be empowered to make any monetary awards for compensatory or other damages.[10] In so concluding, we note that throughout its 47-year history, the Commission has seen its powers ebb and flow almost as many times as its name has been changed. In 1927, the Interracial Commission was created "to consider questions concerning the welfare of colored people residing in the State of Maryland, recommend legislation and sponsor movements looking to the welfare of said people, and to the improvement of interracial relations, and to cooperate with other State agencies to these ends." Chapter 559 of the Acts of 1927. The Commission was also empowered to make by-laws and regulations and was vested with "full and plenary powers to investigate interracial conditions and to promote the welfare of the colored race and the betterment of interracial relations." In 1943, the Interracial Commission became the "Commission to Study Problems Affecting the Colored Population," and was at the same time divested of its specific power to investigate interracial conditions, recommend legislation, make regulations and "sponsor movements." See Chapter 431 of the Acts of 1943. The Commission was authorized by that act only "to make such surveys and studies concerning colored problems and interracial conditions as it may determine and shall have full power and

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[9] The Wisconsin statute provides:

> "If, after hearing, the commission finds that the respondent has engaged in discrimination, the commission shall make written findings and recommend such action by the respondent as will effectuate the purpose of this subchapter. . . ."

[10] No question is raised in this case concerning the constitutionality of authorizing an administrative agency to make monetary awards. *See* County Council v. Investors Funding, 270 Md. 403, 312 A.2d 225 (1973).

authority to promote, in every way possible, the welfare of the colored race and the betterment of interracial relations." In 1951, this body became the "Commission on Interracial Problems and Relations" and reacquired the power to recommend legislation. See Chapter 548 of the Acts of 1951. But once again its powers were seemingly curbed as its authority "to promote the welfare of the colored race and the betterment of interracial relations" was specifically tied to its study and survey functions. In 1960, this restriction was dropped, but at the same time the clause was confined to promoting the betterment of interracial relations. See Chapter 100 of the Acts of 1960. It was not until 1963 that the Commission was given enforcement powers—coincidental with the state ban on racial discrimination in places of public accommodation. Chapters 227 and 228 of the Acts of 1963. Although the Commission's jurisdiction was later extended to cases involving discrimination in employment (Chapter 717 of the Acts of 1965) and discrimination in housing (Chapter 324 of the Acts of 1971) and its general powers were augmented to a degree in 1968[11] and 1969,[12] its enforcement provisions have remained generally unchanged.[13]

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[11] In 1968, the Commission on Interracial Problems and Relations became the Human Relations Commission, Chapter 83 of the Acts of 1968, and acquired the power, reminiscent of the 1927 law, to hold an investigatory hearing whenever any problem of racial discrimination arose. Chapter 464 of the Acts of 1968. The original version of this bill gave the Commission itself the power to petition an equity court to secure compliance with its recommendations, but this provision was eliminated from the final enactment.

[12] In 1969, the Commission, rather than the State's Attorney, was given the authority to seek court enforcement of its orders. Chapter 153 of the Acts of 1969.

[13] Chapter 408 of the Acts of 1972 modified the Commission's hearing procedures. Provisions in the bill originally which would have empowered the Commission to make regulations and to a degree insulated its orders from judicial review were stricken from the final enactment. Chapter 408 of the Acts of 1972.

In view of the Commission's legislative background, the failure of § 14(e) to specifically authorize an award of compensatory damages, the unlikelihood of a legislative grant of unbridled power to an administrative agency to make monetary awards without guidelines or limitations, and the cited cases, we conclude that the Commission's order granting Gutwein six weeks' loss of pay and moving expenses was plainly beyond its power and jurisdiction.

ORDER OF THE CIRCUIT COURT FOR TALBOT COUNTY REVERSING THE ORDER OF THE COMMISSION ON HUMAN RELATIONS REVERSED; THAT PART OF THE COMMISSION'S ORDER AWARDING MONEY DAMAGES VACATED; EACH PARTY TO PAY OWN COSTS.

APPENDIX D

Excerpts from Petitioner's Brief Before the Maryland Court Raising Federal Questions

* * * * * * * * * *

Courts have also recognized the implicit authority and the constitutional duty of state and local civil rights agencies to award adequate remedies. *State of Minnesota* v. *Bergeron, supra; Gilliam* v. *City of Omaha,* 331 F.Supp. 4 (1971) *rev'd on other grounds,* 459 F.2d 63 (5th Cir. 1972). In the face of the indisputable national and state policies to eliminate discrimination, failure or refusal of the Commission or Court to identify and demand those actions necessary to eliminate discrimination constitutes state encouragement of such unlawful practices. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961); *State of Minnesota* v. *Bergeron, supra.* The Supreme Court has made clear its mandate in race discrimination cases:

> [T]he court has not merely the power but the *duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar discrimination in the future. *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965). [Emphasis added].

Nothing contained in Art. 49B suggests a restrictive view should be taken of the Commission's remedial authority. Indeed, analogous decisions of other states and the federal courts indicate the contrary. Therefore, the Commission's authority to award back pay as compensatory damages in an employment discrimination case should be upheld. [pp. 20-21]

APPENDIX E

Excerpts from the Maryland Fair Employment Practices Act, Art. 49B, Md. Code Ann. (1957, 1973 Supp.)

[Substantive Provisions]

DISCRIMINATION IN EMPLOYMENT

Sec. 17. *Declaration of Policy*

It is hereby declared to be the policy of the State of Maryland, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and the promotion of the State's trade, commerce and manufacturers to assure all persons equal opportunity in receiving employment and in all labor management-union relations regardless of race, color, religion, ancestry or national origin, sex, or age, and to that end to prohibit discrimination in employment by any person, group, labor organization, organization or any employer or his agents.

* * *

Sec. 19. *Unlawful employment practices*

(a) It shall be unlawful employment practice for an employer:

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, age or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of the individual's race, color, religion, sex, age or national origin.

* * * * * * * * * *

[Remedial Provisions]

* * *

Sec. 14.

(e) Cease and Desist Order—If upon all the evidence, the Commission finds that the respondent has engaged in any discriminatory act within the scope of any of these subtitles, it shall so state its findings. The Commission thereupon shall issue and cause to be served upon the respondent an order requiring the respondent to cease and desist from the discriminatory acts and to take such affirmative action as will effectuate the purposes of the particular subtitle.

APPENDIX F

Excerpts from Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1970) as amended by the Equal Opportunity Act of 1972, 86 Stat 103 (1972).

[Substantive Provisions]

Sec. 703. *Discrimination because of race, color, religion, sex, or national origin.*

(a) It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

• • •

[Procedural Provisions, Emphasis Supplied]

Sec. 706.

• • •

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, *or by a member of the Commission,* alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. *In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law* pursuant to the requirements of subsections (c) and (d) . . . .

• • •

(c) In the case of an alleged unlawful employment practice occurring in a state, or political subdivision of a state, which has a state or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a state or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the state or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such state or local law. If any requirement for the commencement of such proceedings is imposed by a state or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate state or local authority. [As amended March 24, 1972, P.L. 92-261, Sec. 4].

APPENDIX G

United States Constitutional Provisions

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [Article VI, Cause 2].

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [Fourteenth Amendment, Section 1].

APPENDIX H

Complaint of Discrimination in Employment

(Under Provisions of Article 49B, Annotated Code of Md.)

The act of discrimination must be based on race, color, religious creed, sex or national origin.

Name *Paul D. Gutwein* (Telephone (*none*)

Address *Box 278 C, RFD 4*

City—*Easton* State—*Maryland* Zip Code *20601*

Name of Company, Labor Organization, or Employment Agency Involved—*Easton Publishing Company*

Exact Date of Discrimination *8/11/69*

Address *Hanson Street, Easton, Maryland*

Discrimination for ☒ Race or Color

What did it involve? ☒ Termination

Have you filed a complaint with a Federal, State or Local Agency? Check Yes ☐ or No ☒

The Complaint: Tell the full story of this act of discrimination. Show all dates, places, and the names and titles of persons involved.

In the spring and early summer of 1969, I was living in Francisville, Indiana and engaged in writing mostly poetry and music. In the early part of July, I was visiting my fiancee in the District of Columbia and noticed in the Washington Post an ad placed by the Easton Publishing Company, the publisher of the Easton Star Democrat newspaper

indicating a vacancy for a reporter. Since I was quite low on funds at the time and anxious to obtain employment, and since the job of a newspaper reporter seemed to square with my interest in writing, I submitted a resume, and later was granted an interview in Easton, Md., by a Mr. Montgomery who is now the editor of the Easton Star Democrat. Mr. Montgomery offered me a job with the newspaper and I accepted it. Thereupon, I returned to Francisville, Indiana, purchased a truck for the purpose of transporting my belongings from Indiana to Maryland, and returned to Easton in the truck with my belongings at considerable expense. On or about August 4th, 1969, I entered into the performance of my duties for the Easton Publishing Company. Mr. Montgomery was aware, when he employed me, that I was engaged. He was not aware, nor did he inquire of me, as to the race or color of my fiancee. It happens that she is black and I am white. Prior to beginning my job in Easton, I had leased a dwelling in Talbot County for a period of one year. In a chance encounter with my landlord, he discovered that my fiancee was black, and raised some question as to whether or not I could continue to occupy the leased premises. I discussed this incident with Mr. Montgomery, and shortly after he learned of the fact that my fiancee was black, he informed me that I would no longer be of any value to the Easton Publishing Company as a reporter, because once people in the community learned of my fiancee's race, no one would talk to me and I would be unable to perform my duties. He thereupon advised me that my appointment was terminated, although I am being permitted to continue work on a temporary basis while trying to find another job. I was advised of the termination of my employment on August 11th, 1969. It was made very plain to me that the reason for the termination of my employment was that my fiancee is black and I am white. At the time of the termination of my employment, the Easton Publishing Company employed approximately fifty-two employees and had employed at least twenty-five or more em-

ployees for each working day in each twenty or more calendar weeks in the current or preceeding calendar year. The Easton Publishing Company is engaged in industry, namely, the publication of the Easton Star Democrat newspaper, certain job printing activities and the printing of some twenty-three other newspapers.

No civil or criminal action based on the allegations set forth in this complaint have been instituted by the complainant in any court. I do hereby attest that I have read the foregoing complaint, know the contents thereof, in that the complaint is based upon my own personal knowledge except as to matters stated on information and belief, and that, as to those matters, I believe the same to be true.

/s/ PAUL D. GUTWEIN
Signature of Complainant

Sworn To and Subscribed:
Before me this 20th day
of August, 1969.

/s/ NORMA JEAN CARTER
Notary Public

(Seal)

My Commission Expires July 1, 1970.

[Italicized portion of complaint was completed by Mr. Gutwein].

INDEX

	Page
JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS	1, 2
STATEMENT	2
QUESTION PRESENTED	2, 3
REASONS FOR DENYING A WRIT OF CERTIORARI	3-11
CONCLUSION	12
APPENDIX A - Excerpts From Article 49B, Md. Ann. Code (1957, 1974 Supp.) (State Human Relations Commission and Discrimination in Employment Acts)	13

CITATIONS

Page

CASES:

Betts v. Easley, 161 Kans. 459, 169 P2d 831 (1946) 10
Burton v. Wilmington Parking Authority, 365 US 715 (1961) 6, 10
Crosslin v. Mountain States Tel & Tel Co., 400 US 1004 (1971) 8
County Council, Montgomery County v. Investors Funding Corp., 270 Md 403, 312 A2d 225 (1973) 5
Evans v. Newton, 383 US 296 (1966) 10
Fitzgerald v. United Methodist Community Center, 335 F. Supp. 965, (DC Nebr. 1972) ... 4
Gilliam v. City of Omaha, 331 F. Supp 4, (D. Nebr. 1971) rev'd on other grounds, 459 F2d 63 (8th Cir 1972) 10
Gutwein v. Easton Publishing Co., 272 Md 563, 325 A2d 740 (1974) 6, 7
Iron Workers Local No. 67 v. Hart, 191 NW 2d 758, (Iowa 1971) 8
Love v. Pullman, 404 US 522 (1972) 9
Mendota Apartments v. DC Commission on Human Rights, 315 A2d 832 (DC 1974) 8
Ohio Civil Rights Commission v. Lysyj, 38 Ohio St. 2d 217, 313 NE 2d 3 (1974) 8
Shelly v. Kraemer, 334 US 1 (1948) 10
State of Minnesota v. Bergeron, 290 Minn 351, 187 NW 2d 680 (1971) 10
Sullivan v. Little Hunting Park, 396 US 229 (1968) 7, 10
US by Saxbe v. Allegheny-Ludlum Industries, Inc. 63 FRD1, (1973) 8
Zamantakis v. Commonwealth Human Relations Commission, 10 Pa. Cmwlth. 107, 308 A2d 612, (1973) 8

Index Continued

CONSTITUTIONAL PROVISIONS:
United States Constitution, Article VI, Section 2 1
United States Constitution, Fourteenth Amendment 1

STATUTES:
Civil Rights Act of 1866, 42 U.S.C. § 1982 . . . . 7, 10
Equal Opportunity Act of 1972, 86 Stat. 103 (1972) 2
Maryland Civil Rights Law, Art. 49B, Md. Ann. Code § 1 et seq 1, 2, 4, 5
Title VII of the Civil Rights Act of 1964, 42 U.S. 2000e (1970) 1, 3, 4, 7, 9, 10

TREATISES:
BNA Fair Employment Practice Manual § 451

In The
Supreme Court Of The
United States

OCTOBER TERM, 1974

No. 74-836

PAUL D. GUTWEIN and State of Maryland Commission on Human Relations, *Petitioners*

v.

EASTON PUBLISHING Co., *Respondent*

To The Court Of Appeals of Maryland

RESPONSE OF EASTON PUBLISHING CO., RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully prays that Petitioners' Petition for Writ of Certiorari be denied by this Honorable Court.

JURISDICTION

The jurisdiction of this Court was invoked by Petitioners under 28 USC § 1257 (3).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The statutory provisions involved are found in Art. 49B Md. Code Ann. §§ 1, 3, 12, 13, 14, 15, 17, and 19 (which comprise the State Human Relations Commission, its powers and duties, its enforcement powers and the State Discrimination in Employment Act) and Title VII of the Civil Rights Acts of 1964, 42

USC 2000e (1970) as amended by the Equal Opportunity Act of 1972, 86 Stat. 103 (1972). The State legislation not appearing in Petitioners' Appendix E is set forth in Respondent's Appendix A. The Federal statutory provisions appear in Petitioners' Appendix F and Appendix C at p 13a.

The constitutional provisions raised in the Petitioners' request are the Supremacy Clause, Article VI, Cl.2, and the Fourteenth Amendment, Sec. 1, to the United States Constitution. They are set forth in Petitioners' Appendix G.

STATEMENT

Respondent accepts Petitioners' statement of facts with the exception of the conclusion improperly placed therein that Petitioner was left without a remedy for the violation of a civil right by the decision of the Maryland Court of Appeals. In addition Respondent wishes to point out to this Court that the original complaint filed by Petitioner with the State Commission was filed on August 20, 1969, but that contrary to the requirements of Art. 49B § 13 no written findings were made on the facts until April 21, 1972, some two years and seven months later. The public hearing before the Commission tribunal was not heard until December 11, 1972. Between the time of the written findings of April 21, 1972, and the public hearing, Respondent's key witness (Henry Montgomery), and the only witness for the Respondent familiar with *all* the facts in the case, was killed in an automobile accident.

QUESTIONS PRESENTED

Does the decision of the Maryland Court of Appeals holding that the State Human Relations Commission, in carrying forth its duty to eliminate discriminatory practices, has no statutory authority to grant monetary awards for compensatory or other damages, constitute a "state action" denying to the Petitioner the equal protection of the laws where the Petitioner

had remedies at law for damages caused by a violation of his civil rights before both Federal and State courts in addition to a right to complain and apply to the Federal Equal Employment Opportunity Commission?

Does Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, by requiring that a state agency (to which a person claiming to be a victim of an unlawful employment practice must apply before he can file with the EEOC) be authorized to grant or seek relief from unlawful employment practices, direct the State of Maryland to empower its enforcement agency to adjudicate and grant monetary awards; and if it has not done so in the opinion of the Court of Appeals, has Petitioner by that decision been deprived of his civil rights where he had remedies for damages at law before Federal and State courts in addition to a right to file an original complaint with the EEOC?

REASONS FOR DENYING A WRIT OF CERTIORARI

By Ruling that a State Administration Agency Was Not Granted an Unbridled Unregulated Power to Make Monetary Awards, that the Agency's Statutory Mission Was to Eliminate and Prohibit Discriminatory Employment Practices Rather than Adjudicate the Effects of such a Practice, and that Assessment of Damages for Violation of a Statutorily Protected Right was a Matter for Courts of Law, Under an Adversary System of Justice, the Decision of the Maryland Court of Appeals Is Not a State Action Denying Equal Protection of the Law to a Victim of Discriminatory Employment Practices Where the State and Federal Courts and Federal Agencies Are Open and Available to the Victim for this Purpose.

Title VII of the Civil Rights Act of 1964, 42 USC 2000e-2a makes it an unlawful employment practice for an employer to discharge an individual. . .because of such individual's race; and § 2000e-5c requires that any complaintant—whose State also prohibits the unlawful employment practice alleged and authorizes an agency to grant *or* seek relief from such practice—must wait 60 days after proceedings are commenced in the State agency before filing his complaint with the Equal Employment Opportunity Commission. Furthermore a statute of limitations is established to require a complaintant to bring forth his allegations and/or findings of the State Administrative Agency within 300 days of the institution of state proceedings or within 30 days after the termination of state proceedings whichever is earlier. Most important is § 2000e-5f and g which first informs the complaintant of his right to bring a civil action if EEOC can obtain no conciliation, and second specifies that the *court* may award back pay and any other equitable relief as the court deems appropriate.

The above statutory requirements elicit the following conclusions:

A plaintiff is not required to elect between remedies afforded via a state commission or a federal claim under § 2000e, but could pursue both until one claim reached decision. *Fitzgerald v United Methodist Community Center*, 335 F. Supp. 965 (DC Nebr. 1972).

The pursuit of a remedy in a state proceeding does not preclude the bringing of a federal action under § 2000e-5.

There is no requirement that the State Agency grant relief, only that it seek relief from an unlawful employment practice.

The EEOC itself cannot grant relief, either the complainant or the EEOC must institute an action in Federal Court.

Article 49B, Maryland Annotated Code § 1 et seq. is the Maryland Civil Rights Law. Section 19 makes it an unlawful employment practice for an employer to

discharge any individual. . . . . because of such individuals race, and Section 17 states that it is the policy of the State of Maryland to assure all persons equal opportunity in receiving employment. Section 14 directs the State Commission to issue. . . .an order requiring the "respondent" to cease and desist from the discriminatory act and to take such affirmative action as will effectuate the purposes of the particular subtitle (as stated in the sentence next above), and is given the prerogative of instituting an action in an equity court to enforce compliance with its order.

The Court of Appeals of Maryland is of the opinion that this law is sufficient to remedy the ills to which the law is directed, namely the elimination of discriminatory practices in employment. Similar laws of other states have been similarly interpreted as not including an unbridled grant of power to award monetary damages, concluding that the determination of damages for the breach of a statutorily protected right is a court function to be performed on an adversary basis at law unless the contrary should be explicitly expressed by the legislature—which in turn might raise a question in some states of the constitutionality of such an authorization or delegation of power. See Petitioners' Appendix C pp.14a-19a for cases treated by the Court of Appeals of Maryland on this point. Cf. *County Council v Investors Funding* 270 Md 403, 317 A2d 255 (1973). This is in conformance with the Federal requirement that the state agency be able to seek relief from unlawful employment practices. Nowhere is Maryland required to empower its enforcement agency to grant relief in the form of monetary award to compensate for the effects of an employee's discrimination. The Federal law is stated in the alternative as mentioned above.

It is being argued by the petitioners that the decision of the Maryland Court of Appeals completes a "manner of application" of its civil rights laws. It is then argued that such a scheme of application denies

constitutional remedies to a victim of discrimination, which a *fortiori* is a state action denying the equal protection of the laws to petitioner. But nowhere has the State of Maryland placed its power, property and prestige behind the admitted discrimination. *Burton v Wilmington Parking Authority*, 365 US 715, 725. (1961).

The State Court of Appeals for the purposes of the issues before it, held that, under rules of statutory interpretation, the Maryland General Assembly did not intend that the State Human Rights Commission, an administrative agency, have the power to make monetary awards for damages as a part of the affirmative powers granted to it to eliminate discriminatory practices within the State. This does not constitute an application of the State Civil Rights Laws on the Petitioner. Had the issue of damages come before the court on an appeal of a suit for damages at law claiming violation of a statutorily protected right we would have another question altogether; and if the court therein refused to award damages for violation of civil rights, then perhaps the question of state action might arise. But these were not the issues before the State Court of Appeals and Petitioner has not filed such a claim in any court nor stated that he could not do so.

Maryland's General Assembly simply has not yet seen fit to explicitly direct the State Commission to certify a complaint for suit in a manner similar to that of the EEOC under the laws and regulations which control the administration of its activities. Nor has the State listed specific court enforced remedies. *Gutwein v Easton Publishing Co.*, 272 Md. 563, 325 A2d 740. (See Petitioners' App. C at 13a.) But neither is there any prohibition against a victim filing a suit in State Courts. Forums are in fact abundant for the resolution of the question of damages to Petitioner; he has yet to attempt to utilize any of them. It is clear from the Federal Statute that the petitioner could have filed a complaint with the EEOC and perhaps the

EEOC would have gone to court to champion his rights. Note, however, that the Federal courts are themselves divided over the question whether the Federal statute authorizes payment of other compensation damages. *Gutwein v Easton Publishing Co.*, supra. (Petitioners' Appendix C at 13a and citations therein.) This question is not before the Court at this time under this case but merely underlines the principal that where statutory interpretation is the question some legislative delegations and authorizations of power are not to be lightly implied.

Furthermore, it can hardly be argued that the Equal Employment Title of the Civil Rights Act impairs the sanction of § 1982 of the 1866 Civil Rights Act (42 USC § 1982), Title VII does *not* pre-empt every other mode of protecting a federal right. Under § 1982, Federal Courts have fashioned effective equitable remedies. In addition, 28 USC § 1343 (4) created Federal jurisdiction for damages under any Act of Congress providing for the protection of civil rights. *Sullivan v Little Hunting Park* 396 US 229. Nowhere has Appellant alleged or shown that he has been denied these remedies or has been denied these avenues of seeking redress. Respondent certainly makes no argument that they do not exist. Section 2000e-7 of the Federal Act specifically recognizes that there will be other liabilities in addition to those in § 2000s-5g by stating "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty or punishment provided by any present or future law of any State or political subdivision of a State".

It is true that *Sullivan v Little Hunting Park, supra,* states, *inter alia,* that federal remedies for the protection of federal rights are available in state courts. The opinion further states by way of differentiation, that "as to *damages* 28 USC § 1343 (4) created federal jurisdiction for damages. . . . . under any Act of Congress providing for the protection of

civil rights." There are unquestionably remedies in the Maryland Courts for the damages the Petitioner claims, but this question is not before this Court nor was it before the Maryland Court of Appeals because Petitioner never raised the question below, nor has he proven any at best.

Resolution of issues between the government of Maryland and the respondent at the Commission level did and does not preclude additional (or even inconsistent) relief in favor of the private parties complainant in other litigation; and the conciliation offers required are a hope for rapid eradication of discriminatory employment practices. Cf. *US by Saxbe v Allegheny-Ludlum Industries, Inc.*, 63 FRD 1, 1973. The right to litigate is not abrogated. Cf. *Iron Workers Local No. 67 v Hart* 191 NW 2d 758 (1971).

The remedies oft spoken of here and which the Maryland Agency has to use as affirmative action to eliminate discrimination might include for instance: rehiring, reinstatement, restructuring in-house procedures and practices such as employment forms and seniority systems, injunctions and such other action which will effectuate the above described purpose of the law, namely, to eliminate and correct discriminatory practices. Hence, these affirmative powers, enforceable in a Maryland equity court must be powers directed towards ending the unlawful discriminatory practice and securing compliance with cease and desist orders. Cf. *Ohio v Lysyj*, 38 Ohio St. 217, 313 NE 2d 3 (1974). *Iron Workers Local No. 67 v. Hart*, supra. *Zamantakis v Commonwealth Human Relations Commission*, 10 Pa. Cmwlth. 107, 308 A2d 612 (1973). *Mendota Apartments v DC Commission on Human Rights*, 315 A2d 832 (DC 1974). The Maryland Fair Employment Practices Law is not unconstitutional because it is a prohibitory statute.

The Petitioner has failed to protect his legal rights, and there were a number of means by which he could, and may still be able, to do so, as have been outlined above. In fact *Crosslin v Mountain States Tel*

& Tel Co. 400 US 1004 (1971) held that in a situation where the state agency could *only attempt* to settle the dispute by conciliation and persusasion, the EEOC should give the state the initial opportunity to settle the matter, hence the argument that petitioner lost his rights because he had first to go to the state agency has no merit; it merely afforded Maryland a chance to eliminate discriminatory practices within its borders and under its jurisdiction before petitioner went to the Federal Agency and/or to court. Cf. *Love v Pullman,* 404 US 522 (1972).

The purpose of the Federal law being to eliminate discriminatory practices, and the State of Maryland clearly having a similar purpose, it cannot, therefore, be said that the law of Maryland is inconsistent with the provisions of the Federal law merely because the recovery of monetary damages by aggrieved complainants is left to courts of law. . . . . .as it is by the Federal law, 42 USC § 2000e-5f & g. It cannot be said that Maryland does not provide for the protection of and recovery for violations of Federal civil rights where no action has been instigated in any court to recover damages therefor where the court could take cognizance of its duty to, "so far as possible, eliminate the effects of the past" if indeed that is the standard applicable in State Courts. The Court of Appeals of Maryland heard an appeal under the State Administrative Procedure Act and its decision was limited to issues of administrative law and statutory interpretation, not to inquiring into the merits of a damage recovery suit that was never filed.

The fact that Petitioner picked no forum to pursue his claim for monetary damages does not invalidate Maryland's law nor make the decision of its Court of Appeals a state action depriving a person of his civil rights. Maryland has not restricted Petitioner's remedies; it has directed them to the legal forums of state and federal court systems. Federal laws also provide that the courts be the forum

which awards monetary damages.

The cases cited by the Petitioners such as *Sullivan v Little Hunting Park*, 396 US 229 (1968); *State of Minnesota v Bergeron*, 290 Minn. 351, 187 NW 2d 680 (1971); *Gilliam v City of Omaha*, 331 F Supp. 4 (D. Neb. 1971), rev'd on other grounds, 459 F. 2d 63 (8th. Cir. 1972) and *Betts v Easley*, 161 Kan. 459, 169 P. 2d 831 (1946), do not stand for the wide sweeping propositions petitioners set out. *Sullivan* held that an individual who was expelled by Community Recreational Corporation for advocating the cause of a negro seeking membership had standing under 42 USC § 1982 to sue for an injunction and monetary damages. In *Bergeron*, a discrimination in a real estate transaction case, the state statute specifically authorized the administrative agency examiner to fashion an equitable affirmative remedy. In *Gilliam*, an employment discrimination case, the state statute specifically authorized other affirmative action as may be appropriate, which may include reinstatement with or without back pay. *Burton v Wilmington Parking Authority*, 365 US 715 (1961) is not analogous to the instant situation, for in *Burton* the State of Delaware directly participated in a discriminatory act by sanctioning racial discrimination policies of a tenant of state owned property. *Evans v Newton*, 382 US 296 (1966), cited by Petitioners, is another case where the state by direct action sanctioned racial discrimination (maintenance of public park for whites only). *Shelly v Kraemer*, 334 US 1 (1948) held that state enforcement of restrictive racial covenants involving real estate was unconstitutional, which again involves direct state action.

While the remedy of damages has been recognized under federal law to be available to those whose civil rights have been violated on the basis of the Reconstruction Civil Rights Acts, of 1866, Enforcement Act of 1870, and Title VII, in court proceedings, states have construed their civil rights

acts as not empowering their administrative agencies charged with the administration and enforcement of those laws to allow monetary damages. The cases cited by Petitioners were either suits for damages which were decided under applicable federal laws by federal courts or by state courts construing state laws that specifically authorized the award of monetary damages.

In the opinion of Maryland State Court of Appeals, in Maryland, unlike some states, but like the Federal Government, questions of monetary damages are to be court litigated, and the State Fair Employment Practices Law, as so interpreted, does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

CONCLUSION

In conclusion, the Petitioner cannot complain in this forum because he has failed to protect his rights in Maryland or Federal courts. The Court of Appeals of Maryland in concluding that the Maryland Human Rights Commission, in its effort to eliminate discriminatory practices by affirmative action, may surely fashion a remedy without resort to issues courts are better adapted to litigate, has not committed an action which violates the equal protection clause of the Constitution.

There is no logical question concerning any State Action which would deny a federally protected civil right or of the obstruction by the State of Maryland of the purposes of Congress, therefore the Writ of Certiorari should not issue.

Respectfully submitted,

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RESPONDENT'S APPENDIX A

Excerpts from Art 49B, Md. Code Ann. (1957, 1972 Replacement Vol.)

§ 15. Enforcement of Commission's orders; complaint maliciously made; right to bring civil action not denied.

(a) If any respondent refuses to comply with an order of the Commission made within the scope of any of these subtitles, the Commission may, represented by its general counsel, institute litigation in the appropriate equity court of the county or in Baltimore City where the alleged discrimination took place to enforce compliance with any of the provisions of this article.

The court, in hearing said case shall be governed by the judicial review standards as set forth in the Administrative Procedures Act, § § 255-256 of Article 41 of the Annotated Code of Maryland, except that additional evidence if otherwise admissible under the law of evidence, may be presented to the court without the necessity of an application or without the necessity of showing reasons for the failure to present it at the hearing before the Commission.

§ 13. Investigation; findings; agreement for elimination of discrimination.

(a) After the filing of any complaint the executive director shall consider the complaint and shall refer it to the Commission's staff for prompt investigation and ascertainment of the facts. The results of the investigation shall be made as written findings. A copy of the findings shall be furnished to the complainant and to the person, firm, association, partnership or corporation (hereinafter referred to as

the "respondent"), against whom or which the complaint is made.

(b) If the finding is that there is probable cause for believing a discriminatory act has been or is being committed within the scope of any of these subtitles, the Commission's staff immediately shall endeavor to eliminate the discrimination by conference, conciliation and persuasion.

(c) If an agreement is reached for the elimination of the discrimination as a result of the conference, conciliation and persuasion the agreement shall be reduced to writing and signed by the respondent, and an order shall be entered by the Commission setting forth the terms of the agreement. The Commission shall not enter an order at this stage of the proceedings unless it is based upon a written agreement. If no such agreement can be reached, a finding to that effect shall be made and reduced to writing with copies furnished to the complainant and to the respondent.

§ 12. Complaint to be filed with or issued by Commission; meetings of Commission.

(a) Any person claiming to be aggrieved by an alleged discrimination prohibited by any section of this article may make, sign and file with the Human Relations Commission (hereinafter referred to as the "Commission") a complaint in writing under oath. The complaint shall state the name and address of the person, firm, association, partnership, corporation, State agency, department or board alleged to have committed the act of discrimination together with the particulars thereof; and the complaint also shall contain such other information as may be required from time to time by the Commission.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-836

PAUL D. GOTWEIN and STATE OF MARYLAND COMMISSION ON HUMAN RELATIONS, *Petitioners*

v.

EASTON PUBLISHING CO., *Respondent*

To the Court of Appeals of Maryland

PETITIONERS' REPLY BRIEF

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INDEX

Page

ARGUMENT

The Maryland Courts' Action Foreclosed Any Monetary Relief Under State Law for Victims of Unlawful Discrimination 1

CONCLUSION 4

APPENDIX I—Excerpts From Maryland Civil Rights Law, Art. 49B, Md. Code Ann. (1972 Repl. Vol., 1974 Supp.) 1a

CITATIONS

CASES:

Arnett v. Seattle General Hospital, 65 Wash. 2d 22, 295 P. 2d 303 (1964) 2

City of Highland Park v. Fair Employment Practices Commission, 364 Mich. 508, 111 N.W. 2d 297 (1961) 2

Sullivan v. Little Hunting Park, 396 U.S. 229 (1968) .. 3

STATUTORY MATERIALS:

Art. 49B, Md. Code Ann. §§ 1 *et seq.* 2

Art. 49B, Md. Code Ann. §§ 12-15 2

National Labor Relations Act, 29 U.S.C. § 160 (1970) 2

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EASTON PUBLISHING CO., *Respondent*

To the Court of Appeals of Maryland

PETITIONERS' REPLY BRIEF

ARGUMENT

The Maryland Court's Action Foreclosed Any Monetary Relief Under State Law for Victims of Unlawful Discrimination.

Respondent advances several misleading and incorrect assertions: that a private right of action exists under state law to obtain monetary relief from unlawful discrimination, and that the Maryland court's action denying Commission ordered relief to Petitioner Gutwein did not affect his alleged private right of action under state law.

These incorrect assertions are plainly refuted by an examination of the Maryland Civil Rights law and the Maryland court decision challenged here. The law manifests no private right of action, express or implied. The court decision held that not only was the Commission without authority to order monetary relief but no monetary relief for unlawful discrimination was authorized under the Maryland Civil Rights law.

The Maryland Civil Rights law creates the only state cause of action for unlawful discrimination. *See*, Art. 49B, Md. Code Ann. §§ 1 *et seq.* (1972 Repl. Vol., 1974 Supp.). This law specifies that an administrative agency enforcement scheme is the *exclusive* procedure to resolve charges of unlawful discrimination. *See*, Art. 49B, Md. Code Ann. §§ 12-15 (1972 Repl. Vol., 1974 Supp.) (Respondent's Brief, App. A, pp. 13-14; Petitioner's App. I, *infra*, page). This exclusive procedure is similar to the exclusive procedure established by Congress under the National Labor Relations Act, *compare* 29 U.S.C. § 160 (1970) *with* Art. 49B, Md. Code Ann. §§ 12-15 (1972 Repl. Vol., 1974 Supp.). Indeed, agencies like the Petitioner Commission have been held to be exclusive remedial agencies patterned in their form and operation after the National Labor Relations Board. *See, City of Highland Park* v. *Fair Employment Practices Commission*, 364 Mich. 508, 111 N.W. 2d 297 (1961), *Arnett* v. *Seattle General Hospital*, 65 Wash. 2d 22, 295 P. 2d 503 (1964).

Respondent has failed to demonstrate through any provisions of Maryland law support for its direct right of action theory of recovery for Petitioner Gutwein. Indeed, had such a right existed the Maryland court should have remanded this case to the trial court to afford Petitioner Gutwein an opportunity to seek re-

dress under such a procedure. Failure to so act would amount to the same unconstitutional state action found in *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1968). Nevertheless, the fact the Maryland court did not follow such a procedure further illustrates that it is nonexistent.

Even if Respondent was correct in its unsupported assertion that Petitioner Gutwein could bring a separate cause of action in state court seeking monetary relief for unlawful discrimination, the decision by the Court of Appeals of Maryland foreclosed *any* relief to the individual taking that route. The Maryland court's holding clearly states that no monetary relief is authorized under the state civil rights law, Article 49B. In fact, the court decision expressly noted that the Maryland statute is merely prohibitive and authorizes no compensatory relief which runs to the individual. *See*, Petition for Certiorari, App. C, p. 12a. This point is critical since Respondent readily concedes that unconstitutional state action arises from a judicial denial of a remedy when legally protected civil rights are violated. *See*, Respondent's Brief p. 6.

Respondent also argues that Petitioner Gutwein could have sought directly under federal law the relief denied him by the state. This assertion, of course, is no answer to the constitutional challenge upon state action raised here. The state created substantive civil rights seemingly identical to those available under federal law. The state, by establishing the Commission to receive and process complaints, encouraged those persons in the state believing themselves aggrieved to use the state law. Then the state, by the court decision challenged here, denied these persons remedies necessary to properly vindicate their civil rights. Petitioner

Gutwein and others bypassed their rights under federal law believing the state civil rights law afforded them the same constitutional relief available under the federal scheme. The decision of the Maryland court has unconstitutionally left these people without any remedy, state or federal.

CONCLUSION

For the foregoing reasons and those stated in the Petition for Certiorari, the decision of Court of Appeals of Maryland should not stand uncorrected and the Petition should therefore be granted.

Respectfully submitted,

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APPENDIX I

Excerpts from Procedural Aspects of Maryland Civil Rights Law, Art. 49B, Md. Code Ann. (1972 Repl. Vol., 1974 Supp.).

SECTION 14. HEARING.

(a) *Certification of file; notice to respondent; hearing tribunal; place of hearing; transcript; duty of Commission's counsel; disqualification to participate in hearing.*— In case of failure to reach an agreement for the elimination of the acts of discrimination and upon the entry of findings to that effect, the entire file including the complaint and any and all findings made shall be certified to. The chairman shall cause a written notice to be issued and served in the name of the Commission together with a copy of the complaint requiring the respondent to answer the charges of the complaint at a public hearing before the Commission at such time and place as may be certified in the notice.

The Chairman shall thereupon appoint a hearing tribunal of three persons who shall be members of the Commission to hear such complaint, and said hearing shall be held in the county where the alleged act of discrimination took place. A transcript of all testimony at the hearing shall be made. The case in support of the complaint shall be presented at the hearing by the general counsel of the Commission and no Commissioner who previously made or participated in the investigation or caused the complaint to be filed shall participate in the hearing as a member of the tribunal or in the review of a decision of hearing tribunal pursuant to subsection (g) of this section.

(b) *Answer and appearance of respondent; right to submit testimony and examine witnesses.*—The respondent may file a written answer to the complaint and appear at the hearing in person, or otherwise, with or without counsel. The respondent may submit testimony and shall be fully heard. He may examine and cross-examine witnesses.

(c) *Amendment of complaint or answer; testimony to be under oath and recorded.*—The Commission may permit reasonable amendment to be made to any complaint or answer. Testimony taken at the hearing shall be under oath and recorded.

(d) *Power of Commission to administer oaths, etc.; subpoenas.*—In the administration and enforcement of the provisions of these several subtitles, the Commission has power to administer oaths and to issue subpoenas, to compel the attendance and testimony of witnesses and the production of books, papers, records and documents relevant or necessary for proceedings under the particular subtitle. Any such subpoena shall be served by the sheriff or deputy sheriff of the political subdivision in which is located the residence of the person or the main office of the firm, association, partnership or corporation against whom or which the subpoena is issued. In case of disobedience to a subpoena, the Commission may apply to a circuit court in any county or to a court of appropriate jurisdiction in the Supreme Bench of Baltimore City for an order requiring the attendance and testimony of witnesses and the production of books, papers, records, and documents. In case of contumacy or refusal to obey a subpoena for the attendance of a witness or the production of books, papers, records, and documents, after notice to the person subpoenaed as a witness or directed to produce books, papers, records and documents, and upon a finding that the attendance and testimony of the witness or the production of the books, papers, records and documents, and upon a finding that the attendance and testimony of the witness or the production of the books, papers, records and documents is relevant or necessary for the proceedings of the Commission, the court may issue an order requiring the attendance and testimony of the witness and the production of the books, papers, records and documents. Any failure to obey such an order of the court may be punished by the courts as a contempt thereof.

(e) *Cease and desist order.*—If upon all the evidence, the Commission finds that the respondent has engaged in any discriminatory act within the scope of any of these subtitles, it shall so state its findings. The Commission thereupon shall issue and cause to be served upon the respondent an order requiring the respondent to cease and desist from the discriminatory acts and to take such affirmative action as will effectuate the purposes of the particular subtitle.

(f) *Order dismissing complaint.*—If upon all the evidence, the Commission finds that the respondent has not engaged in any such alleged discriminatory act within the scope of the particular subtitle, it shall state its findings of fact and shall similarly issue and file an order dismissing the complaint.

(g) *Review of decision of hearing tribunal.*—If a decision of a hearing tribunal is not unanimous, the aggrieved party may petition within ten days to the remaining members of the Commission for a review of the decision. Such review by the Commission shall be limited to a review of the entire record of proceedings before the hearing tribunal; provided, however, the Commission may order further argument if necessary in making such a review. The Commission, after making such a review, shall affirm, reverse or modify the decision of the hearing tribunal and an appropriate order shall be filed in accordance with this action.